84-751

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

LONNIE LEWIS, Petitioner,

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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November 5, 1984

QUESTIONS PRESENTED

1. May a wrongfully discharged employee obtain judicial review of his breach of contract claim if his employer denies the employment and his union accepts this denial and does not include the employer in the grievance process?

2. Is the decision of the Court of Appeals for the Ninth Circuit consistent with this Court's decision in Vaca v. Sipes (1967) 387 U.S. 171 in its determination of the issues of the union's duty of fair representation and the employer's repudiation of the grievance process?

3. Should this Court's decision in Vaca v. Sipes, supra, requiring a wrongfully discharged employee to prove a breach of the union's duty of fair representation before he can sue his employer, be reconsidered where there is evidence of deception on the part of the employer?

PARTIES TO THE PROCEEDING

1. Lonnie Lewis, Petitioner
2. Joseph Magnin Co., Inc., Respondent
3. New Magnin, Inc., Respondent
4. Eckdahl Warehouse Co., Respondent
5. Brotherhood of Teamsters and Auto Truck Drivers, Local 85, Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. ____

LONNIE LEWIS, Petitioner,

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Lonnie Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 28, 1984.

OPINION BELOW

The opinion of the Court of Appeals,

not reported, appears in the Appendix hereto. The three separate orders of the District Court for the Northern District of California granting a directed verdict also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 28, 1984. A timely petition for rehearing was denied on August 7, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 185. Suits By And Against Labor Organizations.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an

> industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner Lonnie Lewis is a Teamsters Union truck driver from Pleasanton, California. Petitioner was employed by respondent Joseph Magnin Co., Inc. (Magnin), in San Francisco, California for eight years. In 1979 he was terminated from his job for filing a grievance over a disputed reduction in pay.

Lewis was hired by Magnin in 1971 when the company decided to establish its own in-house trucking operation to

save money, to improve security, and to gain greater control over the drivers. Magnin leased a number of highway tractors and trailers as well as smaller trucks and hired approximately six local drivers and two long distance line drivers, including petitioner. The manager of Joseph Magnin who was in charge of setting up the new trucking operation interviewed and hired Lewis and told him that, although he would work for Joseph Magnin, his paycheck would come from A & B Garment Delivery Company (A & B). The Magnin manager assured him, however, that his employment would be pursuant to the collective bargaining agreements negotiated by his union, the Teamsters National Master Freight Agreement and the Western States Area Over-The-Road Motor Freight Supplemental Agreement. The drivers received all of their instructions and supervision from Magnin who published a

manual of rules for the drivers and regularly provided additional written and oral instructions to them.

During his employment Lewis drove a truck from San Francisco to a point midway between San Francisco and Los Angeles where he met a Magnin driver coming from Los Angeles. The drivers exchanged trailers and each returned to his point of origin.

Magnin considered petitioner to be a Magnin employee and issued him an employee identification card, store and gasoline credit cards and an employee discount at Magnin stores. A & B paid petitioner's wages and benefits and billed Magnin for the total sum plus a 10 percent commission.

In 1973, A & B notified Magnin that it wished to terminate their relationship. Magnin then entered into a Driver Service Agreement with respondent Eckdahl Warehouse Company which provided that

Eckdahl would pay the Magnin drivers and be reimbursed by Magnin for all expenses plus an eight percent commission. The Driver Service Agreement also provided that Lewis' employment would be consistent with the collective bargaining agreement. Magnin continued to supervise the trucking operation and petitioner's seniority continued to be determined from the commencement of his employment with Magnin in December, 1971.

In 1975, Magnin replaced Eckdahl with Dublin Fast Freight, which signed the collective bargaining agreement with respondent Brotherhood of Teamsters and Auto Truck Drivers Local 85 (Local 85), petitioner's union. In 1977, one of Lewis' paychecks from Dublin was returned by the bank. Lewis notified Joseph Magnin which immediately terminated its relationship with Dublin and returned to Eckdahl under the 1973

Driver Service Agreement. Eckdahl then paid Lewis for the returned Dublin check. Petitioner's employment continued until the summer of 1979 when the events occurred which led to his discharge and this litigation.

Under the collective bargaining agreement petitioner was paid on the basis of both the miles he drove and the non-driving hours he worked (worktime). Between 1971 and August, 1979, petitioner was paid for a minimum of three hours of worktime per day. In July, 1979, however, a Magnin traffic manager asked Lewis to reduce his worktime pay. Lewis rejected any reduction in pay. In August, 1979, Magnin stopped paying a portion of Lewis' worktime and told petitioner that all of his instructions would henceforth come from Eckdahl. Lewis challenged the paycut and respondent Local 85 represented him in this dispute.

Under the collective bargaining agreement only the union could invoke the grievance process on behalf of a driver. The informal grievance procedure was commenced by the union in September, 1979, but only against Eckdahl, not against Magnin. Eckdahl, however, kept Magnin informed of the grievance process. Eckdahl's manager told Lewis that if he persisted with the grievance over the worktime he would be out of a job. Local 85 filed a formal grievance under the Maintenance of Standards provisions of the collective bargaining agreement on October 9, 1979. Three days later, on October 12, 1979, petitioner's employment was terminated. Magnin then changed its operations and contracted with a company in Southern California which flew one of its drivers to San Francisco to take petitioner's job. Petitioner first contacted Magnin

to object to this termination. Magnin denied petitioner was its employee, or that it had any obligation to him. Magnin told petitioner that he would have to take up the matter with Eckdahl.

Local 85 filed a second grievance to challenge the termination of petitioner's employment, but again only against Eckdahl because of a union agent's mistaken belief that a grievance could not be filed against Magnin if it was not a signatory to the collective bargaining agreement. This grievance was based on the change of operations provisions of the collective bargaining agreement which prohibited the type of change put into effect by Magnin in October, 1979.

The formal grievance process under the collective bargaining agreement involves a series of grievance committees comprised of an equal number of employer

and union representatives. Neither the local union nor the particular employer who are parties to a grievance, however, sit on the panel hearing their grievance.

The Petitioner's termination grievance was heard by the first level grievance panel, the Bay Area Labor Management Committee, in December, 1979. This Committee sent the grievance to the second level committee by a deadlock or an equally divided vote. The second level committee, the Joint Western Area Grievance Committee, meeting in San Diego, California, on February 12, 1980, heard and denied petitioner's grievance. The committee gave no reason for its decision. Magnin was not present at the San Diego grievance meeting but both Local 85 and Eckdahl denied that anyone had a contract with Magnin. Eckdahl did admit, however, that Magnin had changed its operations.

Petitioner brought the instant

action for breach of contract and breach of the duty of fair representation under 29 U.S.C. Section 185, 29 U.S.C. Section 159 and 28 U.S.C. Section 1337 in the United States District Court for the Northern District of California in April, 1981. The action proceeded to a jury trial in June, 1983, The Honorable Lloyd H. Burke, presiding. Petitioner presented evidence for six days after which each respondent moved for directed verdict. The District Court granted each motion, dismissed the complaint, and entered judgment for each respondent. See Appendix hereto for the three orders of the District Court. The Court of Appeals affirmed. The Court of Appeals held, in short, that Local 85's failure to file a grievance against Joseph Magnin may have been an "error in judgment" but was not a breach of its duty of fair representation. It also held that Magnin

did not repudiate the grievance process because Local 85 named only Eckdahl in the grievance and Magnin was never asked to participate. The opinion of the Court of Appeals is in the Appendix hereto along with its order denying rehearing.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With This Court's Decision In Vaca v. Sipes.

There is no dispute that petitioner Lewis attempted to exhaust the exclusive grievance procedure established by the collective bargaining agreement. However, Lewis was unable to grieve against Magnin because Local 85 did not file a grievance against Magnin and Magnin denied Lewis' employment. The Court of Appeals recognized the failure of the grievance process, ignored the decision of the grievance panel, and

analyzed the instant case as if the grievance process did not occur. The decision of the Court of Appeals, however, is inconsistent with this Court's decision in Vaca v. Sipes (1967) 386 U.S. 171, in both its determination of the union's duty of fair representation and in its determination of Magnin's repudiation of the grievance process.

In Vaca, this Court set forth when an individual employee may obtain judicial review of a breach of contract claim despite his failure to secure relief through the contractual remedial procedures. The first such circumstance is

> when the conduct of the employer amounts to a repudiation of those contractual procedures [citations omitted]. In such a situation . . . the employer is

> estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

Vaca v. Sipes, supra, 386 U.S. at 185.

In the instant case, Magnin denied petitioner's employment as early as August, 1979, when it told petitioner that all of his instructions would, from then on, come from Eckdahl. The denial was reaffirmed by Magnin at numerous times including the time of Lewis' termination, in Magnin's answer to the complaint in this action, and throughout the trial and appeal of this case.

The Court of Appeals, however, ruled that there was no repudiation of the grievance procedures by Magnin. The lower court's decision was not based on any conduct of Magnin but solely on the

conduct of Local 85 in failing to name Magnin in the grievance or request that Magnin participate in the grievance process. The Court of Appeals failed to consider Magnin's direct denial of Lewis' employment. Magnin's action toward Lewis, not Local 85's analysis of the grievance procedure, is the evidence which determines Magnin's repudiation of Lewis' right to grieve. See Drake Bakeries v. Bakery Workers (1962) 370 U.S. 254.

The second situation recognized in Vaca when an employee may obtain judicial enforcement of his contractual rights arises

> if . . . the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if . . . the employee-plaintiff has been prevented

from exhausting his
contractual remedies
by the union's wrongful
refusal to process the
grievance.

Vaca v. Sipes, supra, 386 U.S. at 185 [emphasis in original].

In the instant case there is no dispute that the union has the sole power under the collective bargaining agreement to invoke the grievance process. The only remaining issue is whether petitioner has been prevented from exhausting his contractual remedies by the union's wrongful refusal to name Magnin in the grievance. The opinion of the Court of Appeals clearly recognizes that the union made "errors in judgment by not filing a grievance against Magnin . . . ." The lower court, however, found this, and other union errors, insufficient to constitute a breach of the duty of fair representation. Again,

this finding is directly inconsistent with the specific rule set out in Vaca.

2. The Purposes Of Federal Labor Laws Will Be Advanced By Modifying The Rule Of Vaca v. Sipes Where There Is Employer Deception

Under the judgment of the Court of Appeals, petitioner is remediless. "To leave the employee remediless in such circumstances would . . . be a great injustice." Id. at 186. Under Vaca, an employee's breach of contract claim against his employer is permitted where there is evidence of such wrongful union conduct even where "the employer . . . may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed . . . ." Id. at 185. In the instant case, however, Magnin did everything within its power to conceal its employment of petitioner and its agreement that the employment of petitioner be consistent with the collec-

tive bargaining agreement. Magnin's conduct with regard to petitioner's employment and the collective bargaining agreement after August, 1979, was a deception to avoid any contractual liability to either petitioner or Local 85. Where such deception by the employer can be shown, this Court should consider expanding the rule established in Vaca that

> the wrongfully discharged employee may bring an action against his employer . . . provided the employee can prove that the union as bargaining agent breached its duty of fair representation in the handling of the employee's grievance.

Id. at 186.

The Court of Appeals found that although Local 85 made "errors in

judgment," the errors "do not reach the 'egregious' level, reflecting 'reckless disregard' for Lewis' rights." See Ninth Circuit Memorandum Decision at App. 5. If this Court were to remove the requirement of establishing a breach of the union's duty of fair representation where there is evidence of deception on the part of the employer, the type of "great injustice" to the employee in the instant case and referred to in Vaca will have a remedy while the standard of conduct for a union's duty of fair representation will not be altered.

Protection of an employer who engages in such deception will not serve the underlying purposes of the federal labor laws and will discourage industrial peace, employee organization, and collective bargaining.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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November 5, 1984.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE LEWIS, Appellant, v. JOSEPH MAGNIN CO., INC., NEW MAGNIN, INC., ECKDAHL WAREHOUSE CO., and BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL 85, Appellees.	)	F I L E D AUG -7 1984 No. 83-2206 DC No. C 81-1481-LMB MEMORANDUM

Appeal from the United States District Court for the Northern District of California
Lloyd M. Burke, United States District Judge, Presiding

Before: WISDOM,* SKOPIL, and NORRIS, Circuit Judges

The panel has voted to deny the petition for rehearing.

The petition for rehearing is denied.

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*The Honorable John Minor Wisdom, Senior Circuit Judge, Fifth Circuit Court of Appeals, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE LEWIS, Plaintiff-Appellant, vs. JOSEPH MAGNIN CO., INC., NEW MAGNIN, INC., ECKDAHL WAREHOUSE CO., and BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS, LOCAL 85, Defendants-Appellees.	F I L E D JUN 28 1984 PHILLIP B. WINBERRY CLERK, U.S. COURT OF APPEALS No. 83-2206 DC No. C 81-1481-LMB MEMORANDUM*

Appeal from the United States District Court for the Northern District of California
Lloyd M. Burke, United States District Judge, Presiding

Argued and submitted April 11, 1984

Before: WISDOM,** SKOPIL, and NORRIS, Circuit Judges

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* Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

** The Honorable John Minor Wisdom, Senior Circuit Judge, Fifth Circuit Court of Appeals, sitting by designation.

Lewis brought this action against Joseph Magnin, Inc., New Magnin, Inc., and Eckdahl Warehouse Co. for breach of the collective bargaining agreement (unlawful discharge) and against the Brotherhood of Teamsters Auto Truck Drivers, Local 85 for breach of the duty of fair representation. The district court granted defendants' motions for directed verdicts. We affirm.

STATUTE OF LIMITATIONS

This section 301 action cannot be barred by retroactive application of the six-month limitations period adopted in DelCostello v. International Brotherhood of Teamsters, 103 S.Ct. 2281 (1983). Barina v. Gulf Trading and Transportation Company, 726 F.2d 560, 564 (9th Cir. 1984).

DUTY OF FAIR REPRESENTATION

A union breaches its duty of fair representation when its conduct is

arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). Unintentional acts or omissions "may be arbitrary if they reflect reckless disregard for the rights of the individual employee, ... severely prejudice the injured employee ... and the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case." Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1090 (9th Cir. 1978) (citations omitted). Simple negligence or poor judgment, however, is not generally a breach of the union's duty. See Tenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982). But see Dutrisac v. Caterpillar Tractor Co., ___ F.2d ___, No. 81-4251, slip op. at 3474, 113 LRRM 3532 (9th Cir. 1983), petition for rehearing pending (unexplained failure

to perform ministerial act in processing grievance resulting in severe prejudice to employee may negligently breach the union's duty of fair representation).

The union agent who investigated Lewis' grievance may have made errors in judgment by not filing a grievance against Magnin and by failing to obtain a copy of the agreement between Eckdahl and Magnin. Another agent gave a sketchy, casual presentation to the Joint Western Area Committee, the final grievance panel. These errors, however, do not reach the "egregious" level, reflecting "reckless disregard" for Lewis' rights. Robesky, 573 F.2d at 1089-90.

REPUDIATION

Lewis argues that Magnin cannot rely on the finality of the grievance decision because Magnin's conduct amounted to a repudiation of that process. In Kaylor v. Crown Zellerbach, Inc. 643 F.2d 1362, 1366 (9th Cir. 1981), we held that an

employee need not exhaust the grievance procedure when the employers's [sic] conduct amounted to a repudiation of the contractual remedies. Kaylor has no application here, however, because Magnin did not repudiate the grievance process. It was undisputed that Lewis' grievance named only Eckdahl and that Magnin was never asked to participate. Magnin's absence under these circumstances does not amount to a repudiation of the contractual remedies.

BREACH OF COLLECTIVE BARGAINING AGREEMENT

Because we find that the union did not breach its duty of fair representation and that Magnin did not repudiate the grievance process, we need not reach the issue of whether Magnin or Eckdahl breached the collective bargaining agreement. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); Fristoe v.

Reynolds Metal Co., 615 F.2d 1209, 1214 (9th Cir. 1980).

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LONNIE LEWIS, Plaintiff, vs. JOSEPH MAGNIN CO., INC., et al., Defendants.	F I L E D JUL 1 4:34 PM '83 Case No. C-81-1481 LHB ORDER RE: JOSEPH MAGNIN CO., INC.'S AND NEW MAGNIN, INC.'S MOTION FOR A DIRECTED VERDICT

On July 28, 1983, following six days of trial in the above-captioned matter and after conclusion of the Plaintiff's case, all Defendants moved for a directed verdict in accordance with Rule 50(a) of the Federal Rules of Civil Procedure. One basis for the motion by each Defendant was the insufficiency of Plaintiff's evidence to establish necessary legal elements of his claim.

This Order, entered upon the motion of Defendants Joseph Magnin Co.,

Inc. and New Magnin, Inc. (collectively referred to as "Joseph Magnin"), is based upon the following findings:

1. Plaintiff has presented insufficient evidence to show that Defendant Teamsters Local 85 violated its duty of fair representation towards Plaintiff, a necessary precondition to a statement of a claim against any Company Defendant for breach of a collective bargaining agreement.

2. Plaintiff has presented insufficient evidence to demonstrate that Joseph Magnin and Eckdahl Warehouse Company were either alter-egos, single employers or joint employers such that Joseph Magnin was bound to a collective bargaining agreement through any such relationship.

3. Plaintiff has presented insufficient evidence to demonstrate that the jurisdictional requirements of Section 301 have been met insofar as

Joseph Magnin is concerned as there has been no showing that Joseph Magnin is party to a collective bargaining agreement concluded between it and a labor organization.

4. Plaintiff has presented insufficient evidence to show that Joseph Magnin was party to or bound by a collective bargaining agreement with Teamsters Local 85.

5. Plaintiff has not presented sufficient evidence to demonstrate that Joseph Magnin was prevented by either its Driver Service Agreement or any provision of a collective bargaining agreement from terminating the line-haul portion of the contractual relationship between Joseph Magnin and Eckdahl.

Having reached the findings set forth above based upon a review of the trial record and consideration of both

Defendants' motions for a directed verdict and Plaintiff's opposition to those motions, and good cause appearing therefrom, the Court hereby

ORDERS that Defendants Joseph Magnin Co., Inc. and New Magnin, Inc.'s motion for a directed verdict be and hereby is granted in accordance with the provisions of Rule 50(a) of the Federal Rules of Civil Procedure and further

ORDERS that Plaintiff's Complaint be and hereby is dismissed on the merits as against Defendants Joseph Magnin Co., Inc. and New Magnin, Inc. and further

ORDERS that Plaintiff pay Defendants Joseph Magnin Co., Inc.'s and New Magnin, Inc.'s costs of suit.

DATED: July 1, 1983.

/s/ Lloyd H. Burke
JUDGE, UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LONNIE LEWIS, Plaintiff, v. JOSEPH MAGNIN CO., INC., a Corporation, et al., Defendants.	Case No. C-81-1481 LHB ORDER GRANTING DIRECTED VERDICT Hearing Date: Hearing Time:

This Court has before it Defendant Eckdahl Warehouse Company's ("Eckdahl") Motion for a Directed Verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. The motion was heard by this

Court on June 28, 1983 after the conclusion of Plaintiff's opening case.

Eckdahl claims that it is entitled to a judgment in its favor, as a matter of law, based on the facts that Plaintiff's evidence does not establish that Eckdahl Warehouse Company breached any provision of the Collective Bargaining Agreement; Plaintiff's evidence does not establish that Plaintiff was laid off by Eckdahl for any reason other than the termination of Eckdahl's business relationship with Joseph Magnin, the concomitant loss of Plaintiff's original work assignment, and the lack of alternative work for Plaintiff; Plaintiff's evidence does not establish that Joseph Magnin agreed to be bound by the Eckdahl-Union Collective Bargaining Agreement; Plaintiff's evidence does not establish that the Union breached its duty of fair representation; and Plaintiff's evidence

has demonstrated that the February, 1980 Grievance Committee's decision is final, binding, and preclusive of this action.

Plaintiff alleges that the evidence shows that Eckdahl breached its Collective Bargaining Agreement with Defendant Local Union 85; that Eckdahl and Defendant Joseph Magnin are joint employers and that Joseph Magnin was bound by the Collective Bargaining Agreement between Eckdahl and Local Union 85 and that Local Union 85 violated its duty of fair representation in processing Plaintiff's grievance relating to Plaintiff's employment termination.

This Court has considered arguments both for and against this motion. Based on Plaintiff's evidence, together with all reasonable inferences drawn from the evidence viewed most favorably to Plaintiff, this Court concludes that Eckdahl is entitled to prevail on its motion, as a

matter of law. Based on the evidence presented by Plaintiff, the Court finds that:

1. Plaintiff's evidence does not establish that Local Union 85 violated its duty of fair representation towards Plaintiff, a necessary pre-condition to a claim against Eckdahl for breach of a Collective Bargaining Agreement;
2. Plaintiff's evidence does not establish that Eckdahl breached any provision of the Collective Bargaining Agreement;
3. Plaintiff's evidence does not establish that Plaintiff was laid off by Eckdahl for any reason other than the termination of Eckdahl's business relationship with Joseph Magnin, the concomitant loss of

Plaintiff's original work assignment, and the lack of alternative work for Plaintiff;

4. Plaintiff's evidence does not establish that Joseph Magnin agreed to be bound by the Eckdahl-Local Union 85 Collective Bargaining Agreement; and

5. Plaintiff's evidence has demonstrated that the February, 1980 Grievance Committee decision is final, binding, and preclusive of this action.

NOW, THEREFORE, IT IS ORDERED THAT the motion of Defendant Eckdahl for a directed verdict be and hereby is granted with judgment to be entered dismissing Plaintiff's Complaint on the merits against Eckdahl and awarding

Eckdahl its costs of suit.

Dated: July 1, 1983

/s/ Lloyd H. Burke
LLOYD H. BURKE
United States District Court Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LONNIE LEWIS, Plaintiff, v. JOSEPH MAGNIN CO., INC., et al., Defendants.	C-81-1481 LHB ORDER GRANTING DIRECTED VERDICT

Defendants Teamsters Local 85 has moved for a directed verdict in its favor at the conclusion of Plaintiff's opening case, as provided for in Rule 50(a) of the Federal Rules of Civil Procedure. The Court has heard argument by the respective parties on said motion outside the presence of the jury, and has reached the following conclusions:

ORDER GRANTING DIRECTED VERDICT

1. That the evidence submitted during the presentation of Plaintiff's opening case is insufficient under applicable legal standards to establish that Defendant Teamsters Local 85 violated its duty to provide Plaintiff with fair representation in the handling of Plaintiff's grievance which is the subject matter of this case, and that said Defendant is entitled as a matter of law to a verdict on this issue; and

2. That in any event Plaintiff's grievance arising out of his layoff lacked merit in that, contrary to Plaintiff's contention, the modifications made in the arrangements for the performance of the driving work to which Plaintiff was assigned prior to his layoff are not subject under the collective bargaining agreement to approval by the Change of Operations Committee. The modifications in work arrangements made in this case

involved a contracting of work to an outside party, whereas the Change of Operations provisions of the agreement apply only to modifications in work arrangements of the same employer whose employees perform the work both prior and subsequent to the modifications. Thus, Plaintiff has failed as a matter of law to establish a violation of the collective bargaining agreement in connection with his layoff. Under settled law, a judgment cannot be entered against Defendant Teamsters Local 85 based on an alleged violation of its duty of fair representation in the absence of a determination that a violation of the collective bargaining agreement has occurred.

For the foregoing reasons:

IT IS ORDERED that the Motion of Defendant Teamsters Local 85 for a directed verdict be and hereby is granted,

and that a verdict be entered by the Clerk of this Court for said Defendant.

Dated: June 30, 1983

/s/ Lloyd H. Burke
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 1984, three copies of the Petition For A Writ Of Certiorari were mailed, postage prepaid, to counsel for each Respondent, addressed as follows:

Maureen E. McClain, Littler, Mendelson, Fastiff & Tichy, A Professional Corporation, 650 California Street, 20th Floor, San Francisco, CA 94108 [Joseph Magnin and New Magnin]; Michael J. Stecher, Silver, Rosen, Fischer & Stecher, A Professional Corporation, 100 Bush Street, Suite 410, San Francisco, CA 94104-3982 [Eckdahl Warehouse Company]; Duane B. Beeson, Beeson, Tayer & Silbert and Rosenthal & Leff, Inc., 100 Bush Street, Suite 1500, San Francisco, CA 94104-3982 [Local 85].

I further certify that all parties required to be served have been served.

Dennis Steven Weaver

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(3)

No. 84-751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LONNIE LEWIS, Petitioner

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

RESPONDENT ECKDAHL WAREHOUSE CO.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 3, 1984

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QUESTIONS PRESENTED

1. Where an employee has been terminated by his employer due to the loss of a particular customer's business and the unavailability of substitute work, may the employee obtain judicial review of his breach of collective contract claim if his union does not join the non-signatory former customer in a grievance proceeding against the employer?

2. A. Is the decision of the Court of Appeals for the Ninth Circuit consistent with this Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967), in its determination that the union breached no duty of fair representation where it failed to grieve against the employer's former customer, which was not a signatory to any collective bargaining agreement?

B. Is the decision of the

Court of Appeals consistent with this Court's decision in Vaca v. Sipes, supra, in its determination that an action for breach of a collective bargaining agreement cannot be brought against an employer's former customer, which was not a signatory to a collective bargaining agreement, because the former customer did not "repudiate" a grievance procedure in which it was never invited or directed to participate?

3. If the employer's former customer was found to have engaged in "deception" concerning its status as a co-employer of the discharged employee, should the decision in Vaca v. Sipes, supra, be reconsidered, insofar as it precludes the discharged employee from obtaining judicial review?

PARTIES TO THE PROCEEDING

1. Lonnie Lewis, Petitioner

2. Eckdahl Warehouse Co., Respondent

3. Brotherhood of Teamsters and Auto Truck Drivers, Local No. 85, Respondent

4. Joseph Magnin Company, Inc., and New Magnin, Inc., Respondents. *

*New Magnin, Inc., was merged into Joseph Magnin Company, Inc. On September 16, 1984, Joseph Magnin Company, Inc. filed a petition in the United States Bankruptcy Court for the Northern District of California for relief under Chapter 11 of the Bankruptcy Code (Case No. 3-84-01756 LK). The initiation of the bankruptcy proceeding caused the stay of this action as to respondent Joseph Magnin Company, Inc. To respondent Eckdahl Warehouse Co.'s knowledge, petitioner has obtained no relief from the automatic stay of proceedings against respondent Joseph Magnin Company, Inc.

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RESPONDENT ECKDAHL WAREHOUSE CO.'S BRIEF IN OPPOSTION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Eckdahl Warehouse Co. ("Eckdahl") respectfully prays that this Court deny petitioner Lonnie Lewis' ("Lewis") petition for a writ of certiorari and that it affirm the opinion and judgment issued by the United States Court of Appeals for the Ninth Circuit on June 28, 1984.

OPINION BELOW

The opinion below and the orders of the Trial Court are appended to Lewis' petition. The Court of Appeals affirmed the trial court's orders granting directed verdicts on behalf of all respondents.

JURISDICTION

Lewis properly invokes the Court's jurisdiction in his petition for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Lewis identifies the relevant statutory provisions in his petition for certiorari.

STATEMENT OF THE CASE

Lewis was a truck driver and member of the respondent labor union ("Local 85"). Between December 1971 and October 1979, he was employed by a succession of trucking companies, each of which had been engaged by

respondent Joseph Magnin Company, Inc. ("Magnin") to provide labor for the transportation of Magnin's inventory between its facilities in Los Angeles and its facilities in San Francisco.

As is relevant to this proceeding, Lewis was employed by Eckdahl between 1977 and 1979. In October 1979, Magnin decided for economic reasons to terminate its relationship with Eckdahl and substituted another carrier, Lease Transportation. Since Eckdahl had no other work for Lewis, it laid him off.

While Lewis was on Eckdahl's payroll, Magnin treated him as an Eckdahl employee and not one of its own. The "Driver Service Agreement" between Eckdahl and Magnin provided that Eckdahl would employ drivers and make their services available to Magnin; and that Eckdahl would pay their wages, fringe benefits, insurance, and taxes. It is

undisputed that Eckdahl paid Lewis and bore the other expenses it was required to pay under the Driver Services Agreement.

The Driver Service Agreement also provided that the "employment of said drivers will be consistent with any applicable collective bargaining agreement." Of the two signatories to the Driver Service Agreement, only Eckdahl was a party to a collective bargaining agreement covering the drivers.

After Lewis was laid off by Eckdahl upon its loss of Magnin's business, Local 85, in protest, filed a grievance with the California Bay Area Labor Mangement Committee ("Bay Area Committee"). Although Lewis now asserts in his petition that his work was terminated as a result of a dispute about a reduction in pay, his layoff grievance proceeding was in reality based on a claimed viola-

tion of a section of the National Motor Freight Agreement covering "Changes of Operations." That section required approval to be obtained from a "Change of Operations Committee" before initiating changes in any existing employer operations if such changes would have an adverse impact upon union labor. Since Magnin was never a party to the collective bargaining agreement, Local 85 filed a grievance only against Eckdahl, but at the grievance hearing its representative argued that Magnin and Eckdahl were Lewis' co-employers, each bound by the terms of the agreement.

Ultimately, Lewis' grievance was denied by the Joint Western Area Committee after an appeal from a deadlocked Bay Area Committee. The Joint Western Area Committee's basis for denial was not disclosed.

Thereafter, the instant lawsuit

was initiated. Below, Lewis never disputed that Eckdahl lost Magnin's business and that it had no other work for him. He claimed, however, that Eckdahl could not rely on the grievance proceeding as final, binding, and preclusive of litigation because Local 85 failed to grieve on Lewis' behalf against Magnin as a co-employer covered by the collective bargaining agreement and thereby breached its duty of fair representation to Lewis. Lewis argued that the Driver Service Agreement's requirement that the drivers' employment be "consistent with any applicable collective bargaining agreement" constituted Magnin's assent to be bound by the collective bargaining agreement rather than, as Eckdahl and Magnin both contended, a requirement that Eckdahl observe the terms of any collective bargaining agreements to which it was a signatory.

After six days of hearing in the Federal District Court for the Northern District of California, Local 85, Magnin, and Eckdahl each moved for directed verdicts. Judge Burke granted the motions. As is relevant here, Judge Burke concluded that the evidence failed to establish:

(1) That Local 85 violated its duty of fair representation to Lewis;

(2) That Magnin and Eckdahl were co-employers under the collective bargaining agreement;

(3) That Magnin was a party to or bound by a collective bargaining agreement with Local 85;

(4) That Magnin was prevented by either its Driver Service Agreement or any portion of a collective bargaining agreement from terminating its use of Eckdahl;

(5) That Eckdahl breached any

provision of the collective bargaining agreement; and

(6) That Eckdahl laid off Lewis for any reason other than the loss of the Magnin work and the lack of alternative work.

Judge Burke also found that the Joint Western Area Committee's February 1980 decision on Lewis' grievance was final, binding, and preclusive of this action against Eckdahl and Magnin.

Upon appeal, the Ninth Circuit found, in its unpublished opinion, that Local 85's agent who investigated Lewis' grievance may have made errors in judgment by not filing a grievance against Magnin and by failing to obtain a copy of the Driver Service Agreement. It further found the Local 85 presentation to the Joint Western Area Committee to have been "sketchy" and "casual." The Court concluded, however, that such

"errors" were not "egregious," and did not reflect "reckless disregard" for Lewis' rights sufficient to justify a conclusion that the duty of fair representation was breached.

The Ninth Circuit also rejected Lewis' argument that Magnin cannot rely on the finality of a grievance decision because its conduct amounted to a repudiation of the grievance process. The Court found that, since Lewis' grievance named only Eckdahl and since Magnin was never asked to participate, Magnin's absence did not constitute a repudiation of the collective bargaining agreement remedies.

In his Petition for a Writ of Certiorari, Lewis now seeks this Court's reweighing of the evidence which the Ninth Circuit found insufficient to establish either a breach of Local 85's duty of fair representation or a repudi-

ation of the collective bargaining remedies by Magnin. He also raises, for the first time, an argument that there should be a "deception" exception to the limitation on employee collective bargaining agreement litigation set forth in Vaca v. Sipes, 386 U.S. 171 (1967).

Eckdahl's responses to Lewis' contentions are set forth below. The Court is respectfully requested to bear in mind that none of Lewis' Petition's contentions are directed against Eckdahl. Instead, they concern Local 85 and Magnin, and arise from Lewis' perceptions that Local 85 failed to represent him fairly and that Magnin in some fashon deceived Local 85 with respect to its alleged employment of Lewis.

SUMMARY OF ARGUMENT

In substantial part, Lewis seeks

only this Court's reweighing of the evidence against Local 85 and Magnin. To reach the conclusions Lewis urges with respect to the fair representation issue, this Court would need to decide that the Ninth Circuit misweighed the undisputed evidence and to substitute its own judgment that Local 85's errors in judgment went beyond simple negligence into the realms of arbitrariness, discrimination, or bad faith. Similarly, this Court would have to reweigh undisputed evidence to conclude that Magnin did not "repudiate" the grievance process when it did not attend a grievance proceeding in which it was not even named as a respondent. The Courts of Appeals should be the courts of last resort for such factual determinations.

With respect to Lewis' new issue, not raised in his appeal to the Ninth Circuit, there is no public policy

basis for a "deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements. The existing rule is sufficiently broad to afford relief against "deceptive" employers in any case where the relief is justified by the record.

Finally, even if certiorari is granted as to the directed verdicts in favor of Local 85 and Magnin, the Court should not disturb the directed verdict in favor of Eckdahl. There is no dispute that Eckdahl lost the work which Lewis performed as its employee and that no substitute work was available. Even if Local 85 is found to have breached its duty of fair representation in failing to name Magnin as a respondent in the grievance proceeding, or Magnin is

found to have repudiated the collective bargaining process, it is undisputed that Local 85 proceeded against Eckdahl, that Eckdahl went through the grievance required by its agreement with Local 85, and that Eckdahl established to the satisfaction of the decisional body hearing the grievance that it did not breach the collective bargaining agreement when it laid off Lewis. Therefore, regardless of the disposition of this case as to other respondents, no basis has been presented for a changed rule or result in Eckdahl's case.

REASONS FOR DENYING THE WRIT

1. This Court Is Merely Being Asked To Substitute Its Weighing Of The Facts For That Of The Ninth Circuit.

In his petition, Lewis asserts that the decision below was in conflict with this Court's decision in Vaca v. Sipes, supra. As Lewis asserts, Vaca v. Sipes sets forth the standard that is to be

followed in determining whether an employee covered by a collective bargaining agreement can obtain judicial review of a breach of contract claim despite a failure to secure relief through the collective bargaining agreement's remedial procedures. This Court identified two circumstances in which an employee would not be precluded from instituting a lawsuit against its employer:

(i) When the employee has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process his grievance; or

(ii) When the conduct of the employer amounts to a repudiation of the contractual procedures in the collective bargaining agreement. Vaca v. Sipes, supra, 386 U.S., at 185.

While Lewis contends that the Ninth Circuit missaplied the Vaca v. Sipes standards, his supporting argument merely asks this Court to dispute the weighing of the evidence by the Court of Appeals. At pages 16 through 17 of the petition, for example, Lewis points out that the Ninth Circuit found there may have been "errors in judgment by not filing a grievance against Magnin...." but this, and "other union errors," were deemed insufficient to constitute a breach of the duty of fair representation. Lewis' petition urges this Court to reach a contrary result, but he identifies no reasons of law or policy that compel rejection of the Circuit Court's analysis of this issue.

Similarly, Lewis attacks the Circuit Court's evaluation of the repudiation evidence and asks this Court to weigh it differently. It

is at least arguable that the repudiation issue is not one critical to the Ninth Circuit's review of the District Court's directed verdicts, since the Circuit Court did not disturb Judge Burke's findings that Magnin and Eckdahl were not Lewis' co-employers and that Magnin was not bound by the terms of the collective bargaining agreement. Without Magnin having been held obligated to follow the grievance procedures, it cannot sensibly be understood to have "repudiated" them. Assuming, however, for the sake of argument that there is valid issue of repudiation presented, Lewis nowhere suggests that the Ninth Circuit applied the wrong legal or public policy standards, but, instead, complains that it relied on different evidence than Lewis would have preferred.

While it is clear that this Court

can review cases turning only on factual issues under Rule 17, it has been, historically, reluctant to so do:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.... [W]e should "adhere to the usual rule of non-interfernce where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

For the most part, Lewis' contentions are, in the final analysis, nothing more than a request to this Court to find the record tilting one way rather than the other, and certiorari should not be granted.

2. Petitioner Identifies No Valid Basis For Creating An Exception To The Rule Of Vaca v. Sipes For "Employer Deception."

In his petition, Lewis raises an argument not previously heard in this proceeding, i.e., there should be an exception to the rule of Vaca v. Sipes where an employer has engaged in deception to conceal the fact of employment and thereby denies contractual liability. In such a case, Lewis urges, the employee should not be required to establish a breach of the union's duty of fair representation before initiating litigation against the putative employer.

No compelling reason has been identified by Lewis for the creation of such an exception, and there clearly is no factual basis in the present record for it: First, Local 85 was certainly not "deceived" by Magnin about its relationship with Eckdahl or Lewis, since, it is

undisputed, Local 85 in fact raised the co-employer issue during the grievance proceeding, despite Magnin's never having been a respondent. Secondly, the overwhelming weight of the record is that Magnin was not, in fact, a co-employer subject to any claims under the collective bargaining agreement and that Lewis could not successfully prosecute such a claim even if certiorari were granted and the sought exception created. Thirdly, Magnin's bankruptcy will, in the ordinary course, extinguish through discharge any indebtedndess which Magnin may have to Lewis as a result of the alleged applicability of the Local 85 collective bargaining agreement and the automatic stay will preclude further litigation against Magnin. In short, if there is an appropriate set of circumstances for a "deception" exception

to the rule in Vaca v. Sipes, this case does not present it.

Similarly, the existing rule is broad enough to encompass employers which have engaged in deception. In any conceivable case where an employee could establish, through litigation, that a putative employer is, in fact, the actual employer notwithstanding a deception concerning its status, the employee himself, prior to institution of union grievance procedures, will have sufficient awareness of the relationship with the alleged employer to call to his union's attention all of the facts giving rise to the contention that a co-employer exists. At that point and depending upon the circumstances, the union will have several options available to it, including actually naming the putative employer as a respondent in the grievance pro-

ceeding; filing an action with the National Labor Relations Board to declare the non-signatory to have engaged in an unfair labor practice and for a determination that is bound by the collective bargaining agreement, compare Krantz Wire & Mfg. Co., 97 NLRB 971 (1952); or bringing an action under Section 301 of the National Labor Relations Act to obtain a declaratory judgment that the putative employer is bound by the terms of the agreement, compare Heavy Cont'rs Assn. v. International Hod Car, L. No. 1140, 312 F. Supp. 1345, 1346 (D.C. Neb. 1966) (Court may hear declaratory relief matters under Section 301). Therefore, contrary to Lewis' assertions, the employee is not without a remedy in any circumstance in which a valid breach of contract action could logically be asserted against a

deceptive employer, since the union, in its discretion, could undertake those steps which would result in a determination of co-employer status in appropriate cases. These steps can easily be taken either prior to the institution of the grievance procedures required under the collective bargaining agreement or through the procedures themselves. Of course, the union has significant discretion to determine whether it will pursue a particular remedy so long as it acts in good faith when exercising that discretion. Humphrey v. Moore, 375 U.S. 335, 342 (1964). If the union's discretionary failure to explore a particular remedy against a deceptive employer constitutes an "egregious" error, the employee retains the option of instituting litigation against the employer on the grounds the union breached its duty of fair representation.

In short, no valid reason has been advanced in this case for a departure from the existing well-defined rule. The overwhelming evidence of the case is that, even if Lewis were permitted to sue Magnin notwithstanding the latter's bankruptcy, it could not establish a co-employer relationship. Further, under Vaca v. Sipes, there are as many remedies available to an employee "deceived" as to employer status as there are for any other employee and no valid policy grounds have been identified as a basis for a different rule in this narrow class of cases.

3. As To Eckdahl, Lewis Asserts No Basis Whatsoever For Granting The Writ.

A close reading of Lewis' entire petition fails to disclose any basis whatsoever for granting of a writ of certiorari with respect to the directed verdict issued on Eckdahl's

behalf by Judge Burke. It is undisputed that Eckdahl, as a signatory to the collective bargaining agreement with Local 85, was required to submit to the grievance process and that, in fact, Eckdahl did all that was required of it by the collective bargaining agreement. It is also undisputed that Eckdahl established to the satisfaction of the committee hearing the grievance that Lewis' employment was terminated because Eckdahl lost Magnin's business and there was no substitute work available. The fair representation, repudiation, and deception issues raised by Lewis concern only the actions of other respondents. In short, nothing urged by Lewis or otherwise before the Court would require disturbance of the trial court's directed verdict in Eckdahl's favor.

CONCLUSION

For the reasons set forth in this brief in opposition, Lewis' Petition for Writ of Certiorari should be denied and the opinion of the Ninth Circuit affirmed, particularly, insofar as it concerns Respondent Eckdahl.

Respectfully submitted,

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San Francisco, CA 94104

Attorneys for Respondent
Eckdahl Warehouse Co.

December 3, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this third day of December, 1984, three copies of Respondent Eckdahl Warehouse Co.'s Brief In Opposition to Petition For A Writ of Certiorari were mailed, postage prepaid, to counsel for each party, addressed as follows: Dennis Steven Weaver, Suzanne M. McDonnell, McDonnell & Weaver, 4091 - 24th Street, San Francisco, California 94114-3789; Maureen E. McClain, Littler, Mendelson, Fastiff & Tichy, 650 California Street, 20th Floor, San Francisco, CA 94108; Duane B. Beeson, Beeson, Tayer & Silbert and Rosenthal & Leff, Inc., 100 Bush Street, Suite 1500, San Francisco, CA 94104-3982.

I further certify that all parties required to be served have been served.

_____

Michael S. Rubin

Counsel for Respondent
Eckdahl Warehouse Co.

No. 84-751

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

LONNIE LEWIS,
Petitioner,

v.

JOSEPH MAGNIN CO., INC., et al.,
Respondents.

Brief Of Respondents Joseph Magnin Co., Inc. and New Magnin, Inc. In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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December 21, 1984

29pp

SPECIAL NOTE

In this suit, Respondents Joseph Magnin Company, Inc., and New Magnin, Inc., are being sued as debtors.[1/] On September 16, 1984, Joseph Magnin Co., Inc. filed a petition under Chapter XI of the Bankruptcy Code, Case No. 3-84-01756 LK. As the Court is aware, the filing of a Chapter XI proceeding acts as an automatic stay of any litigation against the debtor. See 11 U.S.C. § 362(a). Hence, the initiation of that bankruptcy proceeding caused the stay of this action as to Respondents, Joseph Magnin Company, Inc. and New Magnin, Inc. (hereinafter collectively referred to as "Magnin"). In any event, inasmuch as Magnin believes that

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1/ On December 29, 1983, New Magnin, Inc. merged with Joseph Magnin Co., Inc. Joseph Magnin Co., Inc. is a wholly owned subsidiary of the Acquihold Corporation.

this case is not a proper one for granting a writ of certiorari, it opposes the writ for the reasons discussed herein.

QUESTIONS PRESENTED

1. Where an employee has been terminated by his employer due to the loss of a particular customer's business and the unavailability of substitute work, may the employee obtain judicial review of his claim that the collective bargaining agreement was thereby breached if his union does not join the nonsignatory former customer in a grievance proceeding against the employer?

2. A. Is the decision of the Court of Appeals for the Ninth Circuit consistent with this Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967), in its determination that the Union breached no duty of fair representation where it failed to grieve against the Employer's former customer, which was not a signatory to any

collective bargaining agreement and which had never agreed to be bound by any collective bargaining agreement?

B. Is the decision of the Court of Appeals consistent with this Court's decision in Vaca v. Sipes, 386 U.S. at 185, in its determination that an action for breach of a collective bargaining agreement cannot be brought against an employer's former customer, which was not a signatory to a collective bargaining agreement and had never agreed to be bound by any such agreement, because the former customer could not be found to have "repudiated" a grievance procedure in which it was never even asked to participate?

3. If the Employer's former customer was found to have engaged in "deception" concerning its status as a co-employer of a discharged employee, should the decision in Vaca v. Sipes, supra, be

reconsidered, insofar as it precludes the discharged employee from obtaining judicial review of his claim that the customer's conduct violated the collective bargaining agreement?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-751

LONNIE LEWIS, Petitioner,

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

BRIEF OF RESPONDENTS
JOSEPH MAGNIN CO., INC. AND
NEW MAGNIN, INC. IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Respondents, Joseph Magnin Co., Inc. and New Magnin, Inc. ("Magnin") respectfully pray that this Court deny Petitioner Lonnie Lewis' ("Lewis") Petition for a Writ of Certiorari and that it affirm the

opinion and judgment issued by the United States Court of Appeals for the Ninth Circuit on June 28, 1984.

OPINION BELOW

The opinion of the Court of Appeals and the orders of the Trial Court are appended to Lewis' Petition. The Court of Appeals, in an unreported decision, affirmed the Trial Court's Orders granting directed verdicts on behalf of all Respondents.

JURISDICTION

Lewis properly invokes the Court's jurisdiction in its Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Lewis identifies the relevant statutory provision, 29 U.S.C. § 185(a), in his Petition.

STATEMENT OF THE CASE

During all times relevant to these proceedings, Lewis was a truckdriver and

member of the Respondent labor union ("Local 85"). Between December 1971 and October 1979, he was employed by various trucking companies, each of which had been engaged by Magnin to provide labor for the transportation of Magnin's inventory between its facilities in Los Angeles and San Francisco. Each of the various trucking companies was a signatory to a collective bargaining agreement with Local 85. At no time, however, was Magnin a signatory to a collective bargaining agreement with Local 85 or any other collective bargaining agreement covering the drivers.

As relevant herein, Lewis was employed by Respondent Eckdahl Warehouse Co. ("Eckdahl") between 1977 and 1979. Like the other driver supply companies previously used by Magnin, Eckdahl was a party to a collective bargaining agreement with Local 85. In October 1979, Magnin decided

for economic reasons to terminate its relationship with Eckdahl and substitute another carrier, Lease Transportation. Since Eckdahl had no other work for Lewis, it laid him off.

While Lewis was on Eckdahl's payroll, Magnin treated him as an Eckdahl employee and not one of its own. The "Driver Service Agreement" between Eckdahl and Magnin, which as relevant covered Lewis' employment between 1977 and 1979, expressly provided that Eckdahl would employ drivers and make their services available to Magnin and that Eckdahl would pay the drivers' wages, fringe benefits, insurance, and taxes. It is undisputed that Eckdahl paid Lewis and bore the other expenses it was required to pay under the Driver Service Agreement.

The Driver Service Agreement also provided that the "employment of said drivers will be consistent with any

applicable collective bargaining agreement." As previously noted, of the two signatories to the Driver Service Agreement, only Eckdahl was a party to a collective bargaining agreement covering the drivers. Magnin was never a party to any collective bargaining agreement covering the drivers. Additionally, the Driver Service Agreement provided that, upon notice, the Agreement could be terminated by "[e]ither party at any time."

After Lewis was laid off by Eckdahl upon its loss of Magnin's business, Local 85, on Lewis' behalf, filed a grievance with the California Bay Area Labor Management Committee ("Bay Area Committee") in accordance with the governing collective bargaining agreement. Since Magnin was never a party to the collective bargaining agreement, the grievance was filed only against Eckdahl.

Magnin was never asked to participate in the grievance.

The grievance was based on a claimed violation of a section of the National Motor Freight Agreement covering "Changes of Operation." That section required approval to be obtained from a "Change Of Operations Committee" before initiating changes in any existing employer operations if such changes would have an adverse impact upon union labor. At the grievance hearing Local 85's representatives argued that Magnin and Eckdahl were Lewis' joint or co-employers, and that as such each was bound to follow the terms of the collective bargaining agreement prior to changing its operations where the change would adversely affect union labor.

Ultimately, Lewis' grievance was denied by the Joint Western Area Committee after an appeal from a deadlocked Bay Area Committee. The Joint Western Area

Committee's basis for its denial was not disclosed.

In the lower courts, Lewis never disputed that Eckdahl lost Magnin's business and that it had no other work for him. He claimed, however, that Eckdahl and Magnin could not rely on the grievance proceeding as final, binding, and preclusive of litigation because Local 85 failed to grieve on Lewis' behalf against Magnin as a co-employer covered by the collective bargaining agreement and that it thereby breached its duty of fair representation to Lewis. Lewis argued that the Driver Service Agreement's requirement that the drivers' employment be "consistent with any applicable collective bargaining agreement" constituted Magnin's assent to be bound by the collective bargaining agreement rather than, as Eckdahl and Magnin <u>both</u> contended, a requirement that Eckdahl observe the terms of any

collective bargaining agreement to which it was a signatory while it furnished drivers to service Magnin's job requirements.

After six days of hearing in the Federal District Court for the Northern District of California, Local 85, Magnin, and Eckdahl each moved for directed verdicts. Judge Lloyd H. Burke, who had presided over the proceedings, granted the motions. As is relevant here, Judge Burke concluded that the evidence failed to establish:

(1) That Local 85 violated its duty of fair representation to Lewis;

(2) That Magnin and Eckdahl were either alter egos, single employers or joint employers such that Magnin was bound to the Eckdahl-Local 85 collective bargaining agreement;

(3) That Magnin was a party to or independently bound by a collective bargaining agreement with Local 85;

(4) That Magnin was prevented by either its Driver Service Agreement or any portion of a collective bargaining agreement from terminating its use of Eckdahl;

(5) That Eckdahl breached any provision of the collective bargaining agreement; and

(6) That Eckdahl laid off Lewis for any reason other than the loss of the Magnin work and the lack of alternative work.

Judge Burke also found that the Joint Western Area Committee's February 1980 decision on Lewis' grievance was final, binding and preclusive of this action.

Upon appeal, the Ninth Circuit found, in its unpublished opinion, that Local 85's agent who investigated Lewis' grievance "may have made errors in judgment by not

filing a grievance against Magnin" and by failing to obtain a copy of the [Driver Service] agreement between Eckdahl and Magnin." It further found that Local 85's presentation to the Joint Western Area Committee was "sketchy" and "casual." The Court concluded, however, that such "errors" were not "egregious," and did mot reflect "reckless disregard" for Lewis' rights sufficient to justify a conclusion that a duty of fair representation was breached (App. 5).

The Ninth Circuit also rejected Lewis' argument that Magnin cannot rely on the finality of a grievance decision because its decision amounted to a repudiation of the grievance process. The Court found that, since Lewis' grievance named only Eckdahl and since Magnin was never asked to participate, Magnin's absence did not constitute a repudiation

of the collective bargaining agreement remedies (App. 5-6).

In his Petition for a Writ of Certiorari, Lewis now seeks this Court's reweighing of the evidence which the Ninth Circuit found insufficient to establish either a breach of Local 85's duty of fair representation or a repudiation of the collective bargaining remedies by Magnin. Lewis also raises, for the first time, an argument that there should be a "deception" exception to the limitation on employee collective bargaining agreement litigation set forth in Vaca v. Sipes, 386 U.S. 171 (1967).

Magnin's responses to Lewis' contentions are set forth below.

SUMMARY OF ARGUMENT

For the most part, Magnin adopts the arguments set forth in Eckdahl's brief in opposition to Lewis' Petition for a Writ of Certiorari. As is developed therein,

in asking that the Court find that Local 85 breached its duty of fair representation toward him and specifically that the court should conclude that Local 85's conduct evidenced arbitrary, discriminatory and/or bad faith conduct rather than mere negligence, Lewis is simply asking the Court to reweigh the evidence. Notably, Lewis does not argue that the lower court applied the wrong legal standard, but only that it reached the "wrong" conclusion in making this finding. This contention is an insubstantial one for granting the writ.

Likewise, Magnin adopts the argument in Eckdahl's brief that this Court would have to reweigh undisputed evidence to conclude that Magnin did not "repudiate" the grievance process when it did not attend a grievance proceeding in which it was not even named as a Respondent and in which it was never even asked to

participate. As is pointed out in Eckdahl's brief, the Courts of Appeals and this Court should be courts of last resort for such factual determinations.

Magnin also adopts Eckdahl's argument with respect to Lewis' new issue, not raised in his appeal to the Ninth Circuit, that there is no public policy basis for a "deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements. The existing rule is sufficiently broad to afford relief against "deceptive" employers in any case where the relief is justified by the record. Further, even if the Court could find that a "deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements might be

found, this case plainly is an inappropriate vehicle for the Court to find such an exception since no evidence whatsoever was found that Magnin had deceived Plaintiff. Therefore, no basis has been presented for a changed rule or result in this case.

REASONS FOR DENYING THE WRIT

A. This Court Is Merely Being Asked To Substitute Its Weighing Of The Facts For That Of The Ninth Circuit.

Significantly, Lewis does not contend that the Ninth Circuit misapplied the rule of Vaca v. Sipes, 386 U.S. at 190, that a union does not breach its duty of fair representation unless its handling of a grievance was "arbitrary, discriminatory or in bad faith." Accord, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 (1976). Rather, Lewis is simply asking the Court to reweigh the factual evidence to determine that Local 85's alleged "errors" did indeed amount to

"arbitrary, discriminatory or bad faith" conduct. It is well settled that this Court does not sit to redetermine or second-guess Courts of Appeals with reference to factual evidence. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951). Moreover, Lewis points to no facts to establish that Local 85 failed to act in "complete good faith" and with "an honesty of purpose" in pursuing his grievance. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

Lewis' failure to provide any reason, beyond his request that the Court reweigh the evidence, to establish that Local 85 handled his grievance in such a manner to constitute a breach of the duty of fair representation itself requires that his Petition for a Writ of Certiorari be denied. This is so since, as this Court held in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976):

> To prevail against either the company or the union, Petitioners must show not only that their discharge was contrary to the contract, but must also carry the burden of demonstrating breach of duty by the union.

Absent a showing that Local 85 breached its duty of fair representation toward him, Lewis has no cause of action based upon a claim that either Magnin or Eckdahl breached the collective bargaining agreement. Id. Hence, under settled law, Lewis' Petition for a Writ of Certiorari in this case must necessarily be denied.

B. Lewis' Contention That The Lower Court Erred By Finding That Magnin Did Not Repudiate The Grievance Procedure Likewise Asks The Court To Reweigh The Evidence.

Lewis argues in his Petition that the Ninth Circuit wrongly evaluated the evidence that Magnin "repudiated" the Eckdahl-Local 85 collective bargaining agreement's grievance procedures and that therefore he should be entitled to proceed

against Magnin. This argument should be rejected for any and all of the following reasons. First of all, Lewis nowhere claims that the Court of Appeals applied the wrong legal or public policy standards, but is simply asking the Court to reweigh the evidence. Even if the Court agreed to do this, the record provides no basis for a contrary finding since it is undisputed that Magnin was not a party to the Local 85 contract and was not asked to participate in Lewis' grievance. Hence, there is simply no way on this record Magnin could be found to have "repudiated" the contractual grievance procedure by failing to participate in Lewis' grievance.

Secondly, as pointed out in Eckdahl's brief (pages 15-16), it does not appear in any event that this issue was critical to the Court of Appeals' review of the District Court's directed verdicts, since

the Circuit Court did not disturb the lower court's findings that Magnin and Eckdahl were not Lewis' co-employers and that Magnin was not bound by the terms of the collective bargaining agreement. In all of these circumstances, Lewis' argument provides no basis for granting a writ.

In any event, Magnin is clearly entitled to rely on the finality of the grievance committee's decision denying Lewis' grievance not withstanding its non-participation in that procedure since Lewis has never asserted below that his claim against Magnin was a claim independent of Magnin's relationship with Eckdahl. Rather, Lewis has always argued that Magnin had a "co-employer" relationship with Eckdahl that mandated that Magnin be bound to the collective bargaining agreement. Since the only basis for Lewis' argument that Magnin was bound to comply

with the Local 85-Eckdahl contract is through its alleged "co-employer" relationship with Eckdahl, Magnin must be seen to have been in the same shoes as Eckdahl and to thus be wholly protected by the finality of the grievance committee's decision that Lewis' layoff did not violate the collective bargaining agreement.

C. Lewis Identifies No Valid Basis For Creating A New Exception To The Rule Of Vaca v. Sipes For "Employer Deception".

With reference to Lewis' newly-raised contention that there should be an exception to the rule of Vaca v. Sipes, where an employer has engaged in deception to conceal the fact of employment, Magnin adopts in full the argument set forth in Eckdahl's brief in opposition to the Writ for Certiorari (see pages 18-23).

Magnin further wishes to point out that even if the Court could find that a

"deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements could be found, this case is plainly an inappropriate vehicle for the Court to find such an exception since the evidence showed that Magnin had in no way deceived Lewis. Specifically, it is undisputed that Magnin was never a party to any collective bargaining agreement covering Lewis and that it never represented to Lewis or anyone else to the contrary. Further, Lewis does not contend that the lower courts had improperly concluded that Magnin was in any way bound to any collective bargaining agreement. Therefore, no basis has been presented for a changed rule or result.

CONCLUSION

For the reasons set forth in this Brief in opposition, as well as those set

forth in the Brief of Respondent Eckdahl, Magnin respectfully submits that Lewis' Petition for Writ of Certiorari should be denied and the opinion of the Ninth Circuit affirmed.

Respectfully submitted,

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December 21, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-first day of December, 1984, three copies of the Brief of Respondents Joseph Magnin Co., Inc. and New Magnin, Inc. were mailed, postage prepaid, to counsel for each party, addressed as follows: Dennis Steven Weaver, Suzanne M. McDonnell, McDonnell & Weaver, 4091 - 24th Street, San Francisco, California 94114-3789; Duane B. Beeson, Beeson, Tayer & Silbert and Rosenthal & Leff, Inc., 100 Bush Street, Suite 1500, San Francisco, CA 94104-3982; Michael J. Stecher, Michael S. Rubin, Silver, Rosen, Fischer & Stecher, P.C., 100 Bush Street, Suite 410, San Francisco, CA 94104.

I further certify that all parties required to be served have been served.

Ma E McC

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